

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AMERICAN RED CROSS BLOOD
SERVICES, WESTERN LAKE ERIE
REGION,**

Respondent,

Case No. 08-CA-090132

and

**THE UNITED FOOD AND
COMMERCIAL WORKERS UNION,
LOCAL 75,**

Charging Party.

**BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT,
AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION,
TO THE DECISION OF ADMINISTRATIVE LAW JUDGE
MARK CARISSIMI**

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I. STATEMENT OF THE CASE

“In short, it is not enough to find that certain language in a rule is broad enough to arguably apply to Section 7 activity. The appropriate inquiry must center on whether a reasonable employee could believe that the rule prohibits protected activity. When the rules have an obvious intent, they cannot be found unlawful by parsing out certain words and creating theoretical definitions that differ from the obvious ones. If that were the standard, virtually all of the work rules in today’s workplace could be deemed violative of our Act unless they explicitly state that they do not apply to Section 7 activity. Such findings would clearly be inconsistent with the purposes of the Act.”

Lafayette Park Hotel, 326 NLRB 824, 830 (1998) (Chairman Gould, further concurring).

Although properly dismissing a number of the allegations brought by the Acting General Counsel (“AGC”) of the National Labor Relations Board (“NLRB” or “Board”) against the American Red Cross Blood Services, Western Lake Erie Region (“Region” or “Employer”), the Decision of Administrative Law Judge Mark Carissimi (“Decision”) reached incorrect results in two regards.

First, the Decision forgave the failure of the Counsel for the AGC’s (“CAGC”) for the denial to the Region of its fundamental due process rights. At the hearing, the CAGC arrogantly refused to adequately explain the factual or legal basis for the allegations contained in the AGC’s pleadings, dismissively stating that any explanation “will be in our briefs.” Being left to guess at the arguments to be addressed until after post-hearing briefs were exchanged, the Region was not properly apprised of the charges against it, and the Decision failed to rectify this violation of the Region’s rights by dismissing the allegations of the Amended Consolidated Complaint.

Second, the Decision erroneously found that a number of the Region’s agreements, policies and rules dealing with issues of confidentiality violated the National Labor Relations Act (“NLRA” or the “Act”). The Decision is fatally flawed, because it did not

undertake a careful review of the record, applying the uncontested evidence to an analysis of the policies in question and utilizing the perspective of a reasonable employee of the Region. Instead, the Decision simply slapped legal labels on selected words taken wholly out of context in order to find that unfair labor practices had occurred. This failure to properly weigh the evidence and articulate a careful rationale for its findings requires that the Decision be reversed. When sound legal logic and a dose of common sense are applied to the established legal precedents, it is apparent that the confidentiality policies in question are not violative of the NLRA.

II. PROCEDURAL HISTORY

On November 30, 2012, the AGC filed a Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (AGC Ex. 1(l)) (“Amended Complaint”), claiming, in relevant part,¹ that a variety of the Region’s rules, policies and procedures “discourage[d] its employees from forming, joining, and assisting the Union or engaging in other concerted activities,” and thereby “interfere[ed] with, restrain[ed], and coerc[ed] employees in the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.”

A hearing was conducted on February 4, 2013 in Toledo, Ohio before the Hon. Mark Carissimi. At the commencement of the hearing, CAGC was granted permission to further

¹ The Amended Complaint also contained allegations regarding the termination of two former ARC employees, Heidi Coutchure and Amanda Laursen. Those allegations were withdrawn pursuant to a settlement between the Respondent and the Charging Party. See Order Severing Cases and Withdrawing Portions of the Complaint Pertaining to Case 08-CA-086902 and Case 08-CA-086929.

amend the Amended Complaint to add additional unfair labor practice allegations. (Tr. 21:24 – 22:14; 26:2-3; 27:13-16).

On June 4, 2013, Judge Carissimi issued his Decision², concluding that the Region had violated Section 8(a)(1) by maintaining certain provisions dealing with the use of confidential information in its 2005 Confidential Information and Intellectual Property Agreement (“CIIPA”), code of conduct, Employee Handbook and Communications System policy. The Decision also concluded that the Region maintained and applied a 1993 confidentiality agreement and a 2002 version of the CIIPA within the statutory Section 10(b) period and that certain provisions of those documents addressing confidentiality were also violative of the Act. (ALJD 26:46 – 27:43).

III. STATEMENT OF BACKGROUND FACTS

The American Red Cross (“ARC”) is a congressionally chartered instrumentality of the United States, 36 U.S.C. §§ 300101-300113. Initially forged in response to the wartime needs of this country, it has grown into a beacon of hope in the face of disasters, both personal and communal, while playing a critical role in the nation’s blood supply. (Tr. 66:24 – 67:15; 153:9).

ARC’s two branches -- Chapters (responsible for disaster services, health and safety, education, and fundraising) and Blood Services (responsible for the collection, testing and distribution of blood donations through recruitment of volunteer donors) (Tr. 67:19 – 68:2) -- are structured in accordance with the organization’s humanitarian mission to serve the public,

² Throughout this brief, references to the Decision of Administrative Law Judge Mark Carissimi (“Decision”) will be designated as follows: ALJD (followed by page: line numbers).

including during times of emergencies, and aid in disaster preparedness. (Tr. 68:16-22); *see also* AGC Ex. 8, p. 6. By successfully executing its mission, the ARC has built considerable brand recognition. Simply mentioning the “Red Cross” conjures images of volunteers selflessly donating blood to help save the lives of others. The work of the ARC, its employees and volunteers is inextricably intertwined with the unique, revered position that the organization holds in society, which must be protected and maintained. (Tr. 94:1-3). The public’s trust is essential; without it, the ARC would not be able to perform the good work that society has come to depend upon. The policies at issue in this case are part of the organization’s efforts to protect that position of trust and to carry out its mission.

The ARC is a healthcare provider. *Syracuse Region Blood Center*, 302 NLRB 72 (1991). Like most entities in the health care industry, ARC’s Blood Services operations are heavily regulated. (Tr. 69:3 – 70:16; 93:25 – 94:1; 153:7-8). The Federal Drug Administration (“FDA”) and other governmental agencies closely control all aspects of Blood Services’ processes, from recruiting donors to distributing blood. (Tr. 69:6-17; 153:10-13). ARC is currently operating under a consent decree with the FDA, by which ARC must self-report and correct all errors or problems with its system of blood collection and distribution, in order to continually improve its services and protect the safety of the blood supply for the American public. (Tr. 70:8 – 71:6; 153:14-19). Because of the FDA consent decree, ARC’s policies and practices are closely scrutinized, and it is audited on an annual basis; as a result “everything that we do has got to be documented and established to show that we’re doing everything possible to provide the safest blood supply possible ... , as well as whether we’ve got HIPAA concerns taken care of ... [It] is all under the purview of the FDA.” (Tr. 153:20-27).

Although ARC may be widely known, it is not immune from competition. (Tr. 71:7 – 72:17; 151:8-9). In the past few years, the blood collection “business” has become increasingly competitive. There has “been an incredible proliferation of independent blood collectors and commoditization of blood as a product, generally. [At the same time,] the number of donors around the country nationally has reduced, making competition that much more difficult in the business, [with] everybody[] jockeying for donors, sponsors, and frankly hospital customers.” (Tr. 150:22 – 151:4). Given its history, name and brand recognition around the country, some competitors “actually make it appear as if they’re running a Red Cross blood drive, or ... people that are being called are being solicited on behalf of the Red Cross to come and donate blood.” (Tr. 151:12-17). In the Western Lake Erie area for example, the Region faces competition from Life Share Community Blood Service, which conducts local collections, but distributes that blood outside of the community, undermining the Region’s local mission. (Tr. 71:21 – 72:17).

These three considerations -- (1) the American Red Cross’s mission and its role as a humanitarian organization, (2) as a healthcare provider, the need to be compliant with its general regulatory obligations and to meet the specific demands of the FDA and other governmental and private agencies with oversight responsibilities, and (3) business considerations -- shape and inform the policies of the Region at issue here. (Tr. 154:8 – 155:2).

The Region services an eleven county area in Northwestern Ohio and Southeastern Michigan. Employees of the Region have been represented by the Charging Party, United Food and Commercial Workers Union, Local 75 (“Union”) since the late 1970’s. (Tr. 125:13-15). The Union represents a wall-to-wall bargaining unit of approximately 150 (Tr.

125:18-21),³ who are covered by the terms of a collective bargaining agreement and an Employee Handbook, both of which expressly provide that the Union contract will supersede any inconsistent provisions. (AGC Ex. 8, 14). As the Decision correctly held, the Region has a long history of collective bargaining with the Union and cooperative efforts with the labor community in the Toledo area, which provides an important lens through which to analyze the perceptions of employees regarding the Region's policies and procedures. ALJD 18:13-20.

IV. ARGUMENT

POINT 1. The Decision Erred by Finding that the Acting General Counsel Had the Authority to Prosecute This Matter and that the Administrative Law Judge Had the Authority to Issue the Decision. (Exception No. 1).

Ignoring mounting authority, the Administrative Law Judge erred by finding that he had the authority to decide this matter. ALJD 2:46 – 3:2.⁴ Under Section 3(b) of the NLRA, the Board must have a quorum of three members in order to act. *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635, 2642 (2010). At all times during the investigation and prosecution of this matter and at the time of the issuance of the Decision, two of the three members of the Board had been installed pursuant to recess appointments that were constitutionally “invalid from their inception.” *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct.

³ To the extent that it is argued that the rules in question are unlawful as applied to non-represented workers in the Region, it is very important to note that there is no evidence in the record that any such employees as defined in Section 2(3) of the NLRA exist.

⁴ The Decision relies on a footnote from *ORNI 8, LLC*, 359 N.L.R.B. No. 87, n.1 (2013), in which the Board acknowledged the holding in *Noel Canning*, but held that because the “question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.” At the least, this case be stayed until the issue is definitively resolved by the U.S. Supreme Court, which recently granted *certiorari* in *Noel Canning*.

2861 (June 24, 2013). See also, *N.L.R.B. v. New Vista Nursing and Rehab.*, 2013 WL 2099742 (3d Cir. May 16, 2013); *N.L.R.B. v. Enterp. Leasing Co. Se., LLC*, 2013 WL 3722388 (4th Cir. July 17, 2013). The appointments were made during a period when the Senate was not in “recess” within the meaning of the Recess Appointment Clause, U.S. Const. Art. II, § 2, cl. 3, since the Constitution only authorizes intersession recess appointments. Because during the relevant period, two members of the Board (Members Griffin and Block) had been appointed “after Congress began a new session ... and while the new session continued,” the appointments were not made during “the Recess” between sessions and were constitutionally invalid. Moreover, even if the challenged members of the Board had been appointed during a proper intersession recess, their appointments nonetheless were still invalid, because the vacancies which they filled did not arise during an intersession recess and thus were not subject to the Recess Appointment Clause. *Noel Canning* at 507. Because the Board lacked a quorum, its actions during that period were null and void. *Id.* at 507-508.

The NLRB delegates its statutory responsibility to investigate and process unfair labor practice charges to the Acting General Counsel and its responsibility to decide cases initially to administrative law judges. But the source of that authority statutorily remains at all times with the Board itself. See 29 U.S.C. § 160. During periods when the Board is unable to act, such as when it lacks the quorum required by law, any delegations of its authority are inoperative. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. N.L.R.B.*, 564 F.3d 469, 473-75 (D.C. Cir. 2009), *aff’d sub nom., New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635 (2010). Thus, NLRB Region 8 lacked the authority to prosecute this charge, and Administrative Law

Judge Carissimi likewise lacked the authority delegated from the Board to issue the Decision. Accordingly, the Decision should be vacated.⁵

POINT 2. The Region Was Denied Its Right To Due Process. (Exceptions Nos. 3-8).

The Amended Complaint challenges in the broadest of terms a variety of the Region's policies alleging, with a few exceptions, that either entire policies or substantial portions of them are overly broad on their face.⁶ Because of the expansive and undefined sweep of its allegations, the Amended Complaint did not provide the Region with notice as to what was claimed to be unlawful. CAGC's flat out refusal to identify the purportedly offending portions of the policies which comprise the charges being levied denied the Region its right to due process, by failing to provide adequate notice of nature of the unfair labor practices alleged and to allow the Region to develop a proper record. *See Lamar Central Outdoor*, 343 NLRB 261, 265 (2004); *Comau, Inc.*, No. 7-CA-73073, 2012 WL 6755113 (NLRB Div. of Judges, Dec. 26, 2012). The broad, vague and undefined allegations raised here forced the Region to box blindfolded, defending itself against unknown and hidden accusations.

"The fundamental elements of procedural due process are notice and an opportunity to be heard. ... To satisfy the requirements of due process, an administrative agency

⁵ On July 30, 2013, the Senate confirmed five nominees to serve as NLRB members: current Board Chairman Mark Gaston Pearce; Kent Hirozawa, Nancy Schiffer, Philip A. Miscimarra and Harry I. Johnson III. There has been no announcement regarding when the newly appointed members will be sworn in and installed. Once installed, a fully reconstituted NLRB resolves questions about its statutory authority going forward, but this does not render moot the substantial issues regarding the proper authority of the Board at the material times raised in the matter at bar.

⁶ The Amended Complaint itself does not include any allegation that the policies are facially invalid. Rather, it recites that the manner in which the Region enforced the policies was being challenged.

must give the party charged a clear statement of the theory on which the agency will proceed with the case.” *Lamar Central Outdoor*, 343 NLRB at 265. “In determining whether a respondent’s due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation” *NYP Holdings, Inc.*, 353 NLRB No. 30, at *2 (2008).

The Amended Complaint and amendments made to it at the hearing predominately recite entire policies or provisions wholesale. (AGC Ex. ¶¶ 6(A), 7, 8(A)(ii)-(v)). When CAGC offered oral amendments to add new challenges to other policies, rather than provide any degree of particularity, she simply rattled off entire policies or large sections of them. (Tr. 18:2 – 19:17; 20:13-23; 24:19 – 25:12; 26:8 -15; 26:21 – 25). For example, regarding the Region’s Confidential Information and Intellectual Property Agreement, (AGC Exhibit 19), all that was provided was: “Paragraph two, obligation of confidentiality in its entirety to be unlawful. Paragraph four, ownership and return of materials in its entirety to be unlawful.” (Tr. 26:21-24). For another amendment, CAGC acknowledged that the policy is a three-page document and then read nearly every word as the basis for the violation. (*Compare* Tr. 24:19 – 25:12 *with* AGC Ex. 18).

In addition to failing to provide any factual guidance as to the particular words or phrases alleged to be unlawful, the Amended Complaint, as amended at hearing, provided no notice of the legal theories of violation. At trial, all that was said was that the policies were illegal, wrong, prohibited, overly broad, unlawful, restrictive of Section 7 rights, and violative of the NLRA. (Tr. 18:9, 18:12, 18:24, 19:6-7, 20:16, 20:21, 24:25, 26:14-15, and 26:22).

Despite the Administrative Law Judge’s observation that “it may be helpful to have a more focused trial, and to have a little more focused brief, if [CAGC] would be willing to

shed some additional light on [the] theory” (Tr. 11:25 – 12:3), CAGC bluntly refused. ALJD 4:15-20. (Tr. 13:10-13). Instead, she offered only that any further explanation “will be in our briefs” (Tr. 10:9-14), too late for Respondent to address. To make matters worse, CAGC intimated that the refusal to properly notify the Region of the nature of the allegations against it was in petulant retribution for actions during Region 8’s investigation of the charge. (Tr. 12:11-21).

The Decision erred in finding that the Amended Complaint should not be dismissed, notwithstanding these substantial due process concerns. The abject refusal to inform Respondent of the specific terms of its policies that were alleged to be unlawful and the legal theories supporting those allegations undermined due process, which requires “an administrative agency [to] give the party charged a clear statement of the theory on which the agency will proceed with the case.” *Lamar Central Outdoor*, 343 NLRB at 265. This is especially so here, where violations were found based on just a small handful of the thousands of words that were pled by the AGC as alleged violations.

Instead of focusing on the shortcomings of the pleadings and the CAGC’s stonewall tactics, the Decision improperly leaned on the legal acuity of the Region’s counsel to support a finding that due process was met. Turning logic (and the law) on its head, the Decision determined that due process must have been satisfied because “Respondent’s counsel indicated his familiarity with ... recent Board decisions involving the lawfulness of work rules” and “[i]n its 41-page brief, the Respondent fully and cogently addresses all of the issues raised by the complaint.” ALJD 4:22-27. A comparison of the post-hearing briefs of the parties shows that the CAGC raised arguments not anticipated by the Region. More importantly, the knowledge and skill of Respondent’s counsel is irrelevant to a determination of whether the legal standard

for due process has been met. “To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case.” *Lamar Central Outdoor*, 343 NLRB at 265. The proper focus is on the pleadings and CAGC’s statements. *NYP Holdings, Inc.*, 353 NLRB No. 30, at *2 (2008). Due process is not satisfied because Respondent’s counsel is a skilled boxer even when blindfolded; notice is required so that both parties know what they are fighting about.

Further, the Decision erred in finding that the circumstances of this matter were “far different” from those presented in *Lamar Central Outdoor*. ALJD 4:27-28. There, the Board held that introducing a new unpled theory of violation at the exceptions stage would “violate fundamental principles of due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it.” Those principles are applicable here. The CAGC advanced theories and arguments in her post-hearing brief that had not been revealed before. This is not “meaningful notice” and, as *Lamar Central Outdoor* shows, waiting until after the hearing to unveil a theory of violation is too late.

For all these reasons, the Decision erred in its conclusion that:

[T]he Complaint allegations in the instant matter were clear; the Respondent was aware of the legal issues presented by the complaint at the time of the hearing and expanded on those issues in his brief. The Respondent clearly had an opportunity to full and fairly defend itself against the complaint allegations.

ALJD 4:35-38. There was not a sufficiently clear statement of the specific violations that were later argued. The knowledge and the skill of the Respondent’s counsel cannot remedy a lack of notice and does not overcome CAGC’s insistence on waiting until her brief to spring her articulation of the claimed violations on Respondent. This Administrative Law Judge ignored his own observation that a “Respondent has a right to know specifically what the alleged unfair labor practices are.” *Comar, Inc.*, 2012 WL 6755113 at *28.

POINT 3. The Decision Erred in Granting Further Amendments to the Amended Complaint at Trial. (Exception No. 2).

The Decision erred in concluding that the further amendments to the Amended Complaint were sufficiently related to the existing allegations and the Respondent was not prejudiced by permitting the amendments. ALJD 3:29-32. The ALJ's offer to give the Region additional time to respond ignores the actual objection made to the proposed amendments:

Our position is [as] we've already put on the record here, ... GC17 is 15 pages long, if there are provisions in here that the AGC deems to be violative of the Act, we'd like to know what they are so that we can respond. The same thing with the Trademark, GC16, the Trademark pamphlet. *So, while certainly the AGC has the right to move to amend the complaint, we think due process requires a bit more than saying an entire document is violative.*

(Tr. 17:6-14) (emphasis added). This is prejudice that could not be cured with additional time.

As the ALJ recognized at the hearing:

I don't want to rush you, this is important, you're making an amendment to the complaint, so whatever time you need, I'm going to grant you. But I think, I certainly need at this point a little further explication when I'm, you know, dealing with complaint amendments, particularly if there's an objection to them being made. So I need to have a little more groundwork for this.

(Tr. 23:10-17). No further "explication" or "groundwork" was provided. Yet, the ALJ ignored his own instructions, rubberstamped the CAGC's amendments and issued a Decision that entirely ignored the Respondent's objections.

POINT 4. The Decision Erred In Its Findings and Conclusions With Respect To The Region's Confidentiality Policies (Exceptions Nos. 9, 10, 11-26).

"[T]he NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule[s] in question and there is no suggestion that anti-union animus motivated the policy;" there must be evidence in the record "to suggest that any employees believe that the [Policies] prohibited union activities." *Adtranz ABB Daimler-Benz Transportation, N.A. v. N.L.R.B.*, 253

F.3d 19, 29 (D.C. Cir. 2001). The Decision here contravenes that admonition, finding that the Region's Policies are unlawful without any application of the record evidence to the AGC's claims and without considering the understanding of the Region's employees about the policies or the Region's substantial business justifications for its rules.

a. General Legal Principles.

An employer violates Section 8(a)(1) of the NLRA if it maintains a workplace policy that would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd mem.*, 203 F.3d 52 (D.C. Cir. 1999). The Board has developed a familiar two-step inquiry to determine if a workplace policy would have a prohibited chilling effect. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). First, a rule is unlawful if it "*explicitly* restricts Section 7 activities." *Id.* at 646 (emphasis in original). Second, "[i]f the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.⁷

The NLRB has cautioned against "reading particular phrases in isolation," and there is no violation simply because a rule conceivably could be read to restrict Section 7 activity. *Id.* at 646-47. The Board will not engage in "speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity." *Palms Hotel &*

⁷ Note that it has been suggested that a more proper definition would provide that even if it could be said that a rule reasonably chills the exercise of Section 7 rights, it nevertheless should be a lawful exercise of managerial authority if it is justified by significant employer interests, which are certainly present on the record here. *Lafayette Park Hotel*, 326 NLRB at 825 n.5.

Casino, 344 NLRB 1363, 1368 (2005). The mere “unrealized potential” that a rule could possibly be interpreted as barring lawful union organizing activities is not enough to render the rule facially invalid. *Adtranz*, 253 F.3d at 25-26. Instead, the potentially violative phrases must be considered in the proper context, based upon record evidence. *E.g.*, *Wilshire at Lakewood*, 343 NLRB 141 (2004), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *rev’d on other grounds sub.nom. Jochims v. N.L.R.B.*, 840 F.3d 1161 (D.C. Cir. 2007). Context is important and includes the concerns and business purposes that prompt employers to adopt a rule, the application of the rule and its actual impact on employees, all as demonstrated by record evidence. *Adtranz*, 253 F.3d at 27, 28. In sum, employers must be permitted to undertake common sense formulations of their work rules. *Lafayette Park Hotel*, 325 NLRB at 826.

In this case, the Decision properly held that the rules and policies of the Region that are in issue do not explicitly restrict Section 7 rights and that there is no evidence that they were promulgated in response to union activity or applied to restrict the exercise of Section 7 rights. ALJD 8:5-7. Therefore, the only legal issue presented in this case is whether employees of the Region would reasonably construe the wording of the rules and policies in question as prohibiting protected concerted activity under the Act. ALJD 10:7-9.

b. Standards for Analyzing Employer Policies.

Workplace policies cannot be declared to be facially unlawful based upon “fanciful” speculation, but rather must be viewed with an eye towards the way in which the rule was applied and its actual impact on employees. Rather than “parsing workplace rules too closely in a search for ambiguity that could limit protected activity. ... [The Board] should consider ‘the realities of the workplace’ and the actual context in which rules are imposed.” *Adtranz*, 253 F.3d at 28.

Consideration of a challenged policy begins with a “reasonable reading” of the words in question. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. This cautions against viewing particular phrases in isolation, parsing language, speculating that a policy might possibly prohibit conduct that it does not address, or presuming an intent to interfere with employee rights. *Id.*; *Lafayette Park Hotel*, 326 NLRB at 825-26. Such a misguided approach “effectively precludes a common sense formulation by the [employer] of its rule and obligates it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply. Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1).” *Lafayette Park Hotel*, 326 NLRB at 826.

The “search [to resolve] ambiguity in [workplace] rules ... must begin with a focus on the obvious, plain meaning of the language in the rule.” *Id.* at 830 (Chairman Gould, concurring). “When the obvious meaning of such rules is the promotion of [a legitimate employer interest], there is no basis to presume that a reasonable employee might parse out certain language ... and assume that it applies to union organizing.” *Id.* “The appropriate inquiry must center on whether a reasonable employee could believe that the rule prohibits protected activity. When the rules have an obvious intent, they cannot be found unlawful by parsing out certain words and creating theoretical definitions that differ from the obvious ones. If that were the standard, virtually all of the work rules in today’s workplace could be deemed violative of [the National Labor Relations] Act unless they explicitly state that they do not apply to Section 7 activity. Such findings would clearly be inconsistent with the purposes of the Act.” *Id.*

c. The “Reasonable Employee” Standard.

Employer policies should not be dissected through the eyes of a sophisticated labor lawyer searching for language that could theoretically encompass Section 7 activity; “The

appropriate inquiry must center on whether a reasonable employee could believe that the rule prohibits protected activity.” *Lafayette Park Hotel*, 326 NLRB at 830. “[T]he Board thus must evaluate the rule from the perspective of employees who might read the rule.” *Flex Frac Logistics, LLC*, 358 NLRB No. 127, at *2 (2012). Policies cannot simply be declared “to be facially unlawful based upon ‘fanciful’ speculation, but rather must be viewed with an eye towards the way in which the rule was applied and its actual impact on employees.” *Adtranz*, 253 F.3d at 28; *Palms Hotel & Casino*, 344 NLRB at 1368 (The Board will not engage in “speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity.”). Thus, whether a “reasonable employee” would read an employer’s rules and policies as prohibiting protected activity is not assessed from the vantage point of a lawyer or just any employee; rather, the policies must be read through the eyes of a “reasonable employee” with the same viewpoint as employees actually impacted by the policies at issue under the totality of the circumstances.⁸

Although evidence demonstrating actual interpretations of a policy by employees is not essential, *Cintas Corp. v. N.L.R.B.*, 482 F.3d 463, 467 (D.C.Cir. 2007), the Board “may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule[s] in question and there is no

⁸ This is the “reasonable employee” standard applied in other employment law contexts. For example, in Title VII sexual harassment cases, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). And in Title VII cases involving alleged constructive discharge, the inquiry is whether “‘working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’” *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003); *McCoy v. City of Shreveport*, 492 F.3d 551, 558 (5th Cir. 2007); *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987).

suggestion that anti-union animus motivated the policy.” *Adtranz*, 253 F.3d at 29 (emphasis added). “[The Board] should consider ‘the realities of the workplace’ and the actual context in which rules are imposed,” *Id.* at 28. Context is important and includes the concerns and business purposes that prompt employers to adopt a rule, the application of the rule and its actual impact on employees, all as demonstrated by record evidence. *Id.* at 27, 28. “In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, [a] determination to the contrary is unjustified.” *Aroostook County Regional Ophthalmology Center v. N.L.R.B.*, 81 F.3d 209, 212 (D.C. Cir. 1996). Where “there is **no** evidence in the record—let alone ‘substantial evidence’—to suggest that any employees believe that the [employer’s policies or rules] prohibited union activities, while some employees claimed the opposite. . . . [There is] no basis for the NLRB’s holding” such policies or rules unlawful. *Adtranz*, 253 F.3d at 29. (emphasis in original).

In properly defining and applying the “reasonable employee” standard, recent statements by Board members about the lack of awareness about the NLRA among the private sector workforce should be taken into account. As then-Chairman Liebman told Congress: “The proposed notice posting is intended to address what we have reason to believe is a lack of awareness by probably the vast majority of workers in the workplace today, that they have rights under the statute” National Labor Relations and the F.Y. 2012 Budget: Hearing Before the H. Comm. On Appropriations, Subcomm. On Labor, Health and Human Services, Education and Related Agencies, 112th Cong. (2011) (statement of Wilma B. Liebman, Chairman, National Labor Relations Committee). Current Chairman Pearce has commented to the same effect: “A right only has value when people know it exists. We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act”;

N.L.R.B. News Release, NLRB Launches Web Page Describing Protected Concerted Activity (June 18, 2012). *See also*, *NLRB Final Rule Will Require Notice of Posting*, Daily Lab. Rep. (BNA) No. 165 at AA-1 (Aug. 25, 2011) (“stating that ‘[f]or employees to exercise their NLRA rights . . . they must know that those rights exist,’ Chairman Wilma B. Liebman and Members Craig Becker and Mark Gaston Pierce agreed there was a ‘knowledge gap’ that left most American employees unaware of their NLRA protections unless and until they were involved in an NLRB proceeding . . .”); *Liebman Notes ‘Profound Divide’ Over NLRA*, Daily Lab. Rep. (BNA) No. 112 at C-2 (June 10, 2011) (“with private-sector union membership below 7%, fewer and fewer Americans even know anyone who belongs to a union, the lack of public understanding is the reason the Board issued its notice to proposed rulemaking.”).

Given these expert observations, a “reasonable employee” should not be expected to read limitations on Section 7 rights into neutral expressions of employer policy. And the viewpoint of a “reasonable employee” cannot be established by conclusory assertions; it must be shown through evidence in the record. In the absence of evidence that the employer is imposing an unreasonably broad interpretation of the rule upon employees, a determination to the contrary is unjustified. *Arrostock County Regional Ophthalmology Center v. N.L.R.B.*, 81 F.3d 209, 212 (D.C. Cir. 1996). Where “there is *no* evidence in the record—let alone ‘substantial evidence’—to suggest that any employees believe that the [employer’s policies or rules] prohibited union activities, while some employees claimed the opposite. . . . [There is] no basis for the NLRB’s holding” such policies or rules unlawful. *Adtranz*, 253 F.3d at 29. (emphasis in original).

d. The “Reasonable Employee” of the Region.

To understand the “reasonable employee” of the Region, begin with the fact that the Employer’s policies and its mission are introduced during new hire orientation. (Tr. 131:17-132:14; 146:6 – 148:3; Resp. Ex. 9). Additionally, after employees returned from a strike in

2012, they were provided with a mandatory re-orientation which included a review of the policies. (Tr. 104:14-20; 106:1-3). And employees have been repeatedly directed to review and study the Employee Handbook. (Resp. Ex. 8; Tr. 109:19). The result is that Region's workforce should understand the policies and their context and intent given the Employer's business and mission. (Resp. Ex. 1, 2; Tr. 108:7 – 109:8, 143:8-20, 156:17 – 157:22).

The affected employees are all represented by the Union and are covered by a collective bargaining agreement. (Tr. 125:16-21).⁹ The Union contract makes clear that the workers are protected from any application of the Region's policies that may infringe upon their statutory rights. Article 14 states: "there shall be no discrimination by the Employer ... against any employee or applicant on account of support or activity, or lack of support or activity for the Union" (AGC Ex. 14, p. 15; Tr. 129:6-15). Article 24(H) strengthens this point by providing that the Region is prohibited from entering into any agreement or contract with its employees which in any way conflicts with the terms and provisions of the collective bargaining agreement. (AGC Ex. 14, p. 30).

The Region's policies reinforce these important contractual protections. The Employee Handbook explicitly provides that the collective bargaining agreement will supersede any provisions of the former which conflict with the latter. (AGC Ex. 8 at p. 4). This is reiterated in the "Agreement and Acknowledgment of Receipt of Employee Handbook" form, which reminds workers that their employment is generally covered by the terms of the collective bargaining agreement with the Union. (AGC Ex. 8 at p. 56; AGC Exs. 12, 13).

⁹ The Decision states that "[t]he Respondent also employs employees who are not represented by the Union, but the record does not indicate the number of such employees." ALJD 2:23-24. However, this assumes a fact not in evidence, *i.e.* that there are non-unit staff in the Region who are statutory employees under Section 2(3) of the Act. There is absolutely nothing in the record to support that assumption.

The record shows that until the filing of the unfair labor practice charge giving rise to this case, neither the Union nor any employee ever raised any concern about any policy, filing no grievances, making no informal complaints or even asking questions about the Region's rules. (Tr. 98:20 – 99:4; 142:12-15; 144:10-16). Policies never have been mentioned at the Labor Management Committee, a contractually-created mechanism specifically set up by the Union and the Region to “provide a forum for employees to bring suggestions and concerns” to the Region's attention. (AGC Ex. 14 at p. 28; Tr. 129:20-24; 141:14 – 142:11). During the most recent round of collective bargaining negotiations completed in 2012, the Union raised no issue and made no proposal regarding any policies. (Tr. 98:5-12). Nor has the Union made any proposals or brought forward any complaints about any Region policies after the new contract went into effect on June 26, 2012, other than filing the instant charge. (Tr. 98:9-19).

All of this shows that the Region's employees are informed in the collective bargaining agreement, the Employee Handbook and elsewhere that their rights to engage in union activity are protected. However, instead of standing in the shoes of a reasonable employee of the Region, the Decision analyzed the challenged policies in an academic vacuum, divorced from the reality of the Region's workplace as established on the record and improperly presuming that workers would be chilled in their Union activities by almost any expression of management policy.

e. The Business Reasons for the Region's Confidentiality Policies.

With respect to a healthcare organization such as the Region, a reasonable reading of any confidentiality policy must accept that it is directed to sensitive patient and business information, rather than narrowly applying to discussions about terms and conditions of employment. *Comm. Hosp. of Central Cal. v. N.L.R.B.*, 335 F.3d 1079, 1089 (D.C. Cir. 2003). The Supreme Court has held that “in the context of health-care facilities, the importance of the

employer's interest in protecting patients from disturbance cannot be gain-said." *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 505 (1978). The NLRB itself recently has recognized that the privacy concerns of healthcare patients are "weighty" and that employers have a significant interest in preventing the wrongful disclosure of individually identifiable health information; in such instances, employees would reasonably interpret confidentiality rules "as a legitimate means of protecting the privacy of patients . . . not as a prohibition of protected activity." *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65 at slip. op. 5 (2011). As the D.C. Circuit has opined:

Confidential information is information that has been communicated or acquired in confidence. A reasonable employee would not believe that a prohibition upon disclosing information, acquired in confidence, 'concerning patient or *employees*' would prevent him from saying anything about himself or his own employment. And to the extent an employee is privy to confidential information about another employee or about a patient, he has no right to disclose that information contrary to the policy of his employer.

Aroostook, 81 F.3d at 212-13. *Id.* (emphasis added).

Beyond these common sense legal principles, federal laws, such as the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information), and many state privacy statutes require employers to protect medical information and sensitive personal data. Under Ohio law, where the Region's offices are located, an employer is liable if computerized data containing personal information is disclosed or otherwise compromised by a breach of security or confidentiality; personal information is defined to include an individual's name, social security number, etc. *See* Ohio Rev. Code Ann. § 1349.19.

The Region is a healthcare provider, entrusted with a significant amount of information from its donors, both volunteer and employee. (Tr. 79:18-25). Thus, confidentiality is of the utmost importance. Donors provide demographic information, like names, addresses,

dates of birth, and, in some cases, social security numbers, as well as contact information. (Tr. 79:25 – 80:7). Most importantly, donors undergo mini-physicals, so Region files contain vital signs, blood types, and responses to medical screening questionnaires. (Tr. 80:8-14). After blood is collected, it is tested for markers for certain diseases, with results maintained in Region files. (Tr. 80:15-22). It is undisputed that all of this is “really, truly medical information which [the Region is responsible for] safeguarding.” (Tr. 80:13-14).

Significantly, many ARC employees are also blood donors, who like all others, provide sensitive personal medical information as part of the process. (Tr. 156:20 – 157:2). For example, if an employee is disqualified from donating blood because of a medical condition, Region policies are intended to ensure that such highly personal information is not disclosed; “maintaining that confidentiality is important.” (Tr. 156:25 – 157:2). Protection of donor medical information (both employee and third-party) by and of itself is sufficient reason for the Region to maintain stringent confidentiality policies.

But confidentiality is not only an obligation of the Region as a healthcare provider; it is essential to its business model. Board law has always recognized that employers have a “substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.” *Lafayette Park Hotel*, at 826. This is consistent with principles of Ohio state law. *E.g. Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App. 3d 786, 673 N.E. 2d 182 (Ohio App. 10th Dist. 1996) (company’s confidential and proprietary information included rates, customer contacts and employee names).

In order to meet the demands of the medical patients that it serves, the Region needs to collect blood every day. (Tr. 80:25 – 81:6). Therefore, the Region’s goal is to convince

donors to consider giving blood not just once, but for a lifetime by building donor loyalty. (Tr. 81:2-7). Similarly, the Region strives to build relationships with its sponsors, so that they will hold blood drives on an ongoing basis, which can be as frequently as every fifty-six days (Tr. 81:18 – 82:7; 82:2-5). There is “a lot of work that goes into [those] relationships, and it’s not one that [the Region] want[s] in a competitive environment to be ... share[d] with a potential competitor.” (Tr. 82:7-10). And the Region faces such marketplace competition every day.

Trust is essential to donor and sponsor relationships. Any breach of this trust puts the Red Cross mission at risk. The Region’s Policies regarding confidentiality are intended to protect the information regarding donors, sponsors, and blood drives that it works so hard to develop, and the Region’s workforce is well aware of these mission-critical interests.¹⁰

In addition to its responsibilities as a healthcare provider and a viable business operation, the Region is also concerned about protecting against identity theft, especially with respect to employee files. (Tr. 138:21 – 139:2). That includes demographic information, contact information, dates of birth and social security numbers. (Tr. 96:1-6; 138:21-25). The Region is particularly sensitive to these potential risks because employee data has been compromised in other Red Cross regions. (Tr. 139:3-14). As a result, the Region has implemented precautions to help safeguard confidential employee information. (Tr. 139:15-20).

Each of the Region’s separate expressions regarding confidentiality at issue here -
- the three confidentiality policies¹¹ and the confidentiality provisions in the two identical Codes

¹⁰ The Region takes violations of this trust very seriously. For example, in 2008, the Region terminated an employee because he accessed information in a donor’s records during a blood drive and phoned her for a personal reason. *See* Resp. Ex. 10; (Tr. 140:1-10).

¹¹ The current 2005 Confidential Information and Intellectual Property Agreement (“2005 CIIPA”) (AGC Ex. 19), the old, superseded 2002 Confidential Information and
(continued...)

of Business Ethics,¹² the Work Rules,¹³ and the Red Cross Communication System policy¹⁴ -- is unquestionably intended to protect sensitive medical information and proprietary business information, and not to limit employee discussion of terms and conditions of employment. Given the absence of language in the Policies directly restricting protected concerted activities, and given the context for the policies, the Region's employees are well aware of the purpose, intent and effect of these confidentiality requirements, such that they would not read them to be directed at, or an infringement upon, Section 7 rights. *E.g., K-Mart*, 330 NLRB 263 (1999).

f. **The Decision Erred Finding that the Region Violated Section 8(a)(1) of the NLRA By Maintaining a Confidentiality Provision in its 2005 Confidential Information and Intellectual Property Agreement. (Exceptions Nos. 9- 20).**

In analyzing the Region's 2005 Confidential Information and Intellectual Property Agreement ("CIIPA"), the Decision ignores the purpose and scope of that document's confidentiality provision. The context of the CIIPA is established at the outset by its title and content; the thrust of the document is to address a specific, targeted purpose—to protect the ownership and limit the disclosure of the intellectual property and inventions of the Red Cross. The CIIPA makes clear under the heading of "Reasons for Agreement" that its "restrictions are

(...continued)

Intellectual Property Agreement ("2002 CIIPA") (AGC Ex. 5), and the old, superseded 1993 Confidentiality Policy (AGC Ex. 3).

¹² The identical paragraphs in the American Red Cross Code of Business Ethics and Conduct (AGC Ex. 18) and the Code of Business Ethics and Conduct contained in the Employee Handbook (Ex. 8, p. 36) (each a "CBE&C").

¹³ The first bullet point of the Work Rules contained in the Employee Handbook (AGC Ex. 8, p. 47).

¹⁴ Paragraph 3 of the Red Cross Communication Systems Policy contained in the Employee Handbook (AGC Ex. 8, p. 41).

for the purpose of enabling Red Cross to fulfill its humanitarian mission, to maintain donors, customers and clients” (AGC Ex. 19).¹⁵ Moreover, most of the document sets out definitions and rules for dealing with the Employer’s intellectual property. By clear terms, the CIIPA is not intended to regulate terms and conditions of employment or other workplace issues.

The definition of “Confidential Information” in the CIIPA extends to five subparagraphs:

- (i) information relating to Red Cross’ financial, regulatory, personnel or operational matters,
- (ii) information relating to Red Cross clients, customers, beneficiaries, suppliers, donors (blood and financial), employees, volunteers, sponsors or business associates and partners,
- (iii) trade secrets, know-how, inventions, discoveries, techniques, processes, methods, formulae, ideas, technical data and specifications, testing methods, research and development activities, computer programs and designs,
- (iv) contracts, product plans, sales and marketing plans, business plans and
- (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is in written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross’ agents.

¹⁵ The CIIPA opens with this paragraph:

I desire to be employed or to continue to be employed by Red Cross. I acknowledge that I may, in the course of my employment with Red Cross (“Employment”), have access to or create (alone or with others) confidential and/or proprietary information and intellectual property that is of value to Red Cross. I understand that this makes my position one of trust and confidence. I understand Red Cross’ need to limit disclosure and use of confidential and/or proprietary information and intellectual property. I understand that all restrictions are for the purpose of enabling Red Cross to fulfill its humanitarian mission, to maintain donors, customers and clients, to develop and maintain new or unique products and processes, to protect the integrity and future of the Red Cross and to protect the employment opportunities of my fellow employees.

(AGC Ex. 19).

Although information relating to “personnel ... matters” and “employees” is mentioned, those are 3 words out of approximately 120 and are part of lengthy illustrative lists that also include, for example, information relating to Red Cross’s clients, customers, suppliers, donors (blood and financial), sponsors and product, sales and marketing plans. (AGC Ex. 19). Personnel and employment matters in no way are implicated when the provision is viewed in its entirety.

A “fair reading” of the CIIPA cannot concentrate on “personnel” or “employees” standing alone, as the Decision erroneously does. Only by quarantining those two words can an argument even be manufactured to the effect that this policy should be read as restricting the discussion of terms and conditions of employment, as a matter of fact or law. Unsurprisingly, the NLRB has rejected such cramped analysis. *See Lafayette Park Hotel*, 326 NLRB at 825-26 (“We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the Respondent an intent to interfere with employee rights”); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

The fair, reasonable, and legally appropriate reading of CIIPA understands the terms “personnel” and “employees” in the context of the agreement as a whole. The Decision sets aside basic reading comprehension and concludes that the CIIPA “defin[es] confidential information as including information regarding ‘personnel’ and ‘employees.’” ALJD 8:16-17. If the text is read in complete sentences, instead of individual words, it is clear that the CIIPA defines confidential information in a far different and far broader manner. Considered normally, the challenged terms are not about prohibiting disclosure of information personal to any particular employee. Instead, they are part of illustrative sentences intended to encompass larger, legitimate and obvious business concerns. The Region has an undeniable interest in protecting

certain categories of personnel matters and employee information, as reflected in the record, *e.g.*, “health information, social security numbers, things like that.” (Tr. 156:10-20). Any Red Cross employee would reasonably understand this to be the aim of the CIIPA, especially because the CIIPA is not a work rule; it is a document specifically intended to address other business interests.

In addition to reading words instead of sentences, the Decision also attributes words to the CIIPA that are not there at all. The Decision finds the CIIPA “would be reasonably understood by employees to prohibit the disclosure of information including wages and terms [or] conditions of employment,” when the CIIPA makes no such mention or implication. There is no basis in the record for this conclusion, especially because NLRB members have opined that a reasonable employee would be unaware of such rights and a reasonable Region employee would know that she had Union protections in this regard.

Moreover, the “language here does not explicitly prohibit the discussion or disclosure of wages, hours, working conditions, or any other terms and conditions of employment, nor does it forbid conduct that clearly implicates Section 7 rights.” *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). That opinion is dispositive, as the NLRB there dealt with “employee information” as part of an illustrative list in a long provision prohibiting the disclosure of proprietary information. *Id.* at 279. The Board ruled that “employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the Respondent’s proprietary business information rather than to prohibit discussion of employee wages.” *Id.* The same holds true here.

Furthermore, the precedent relied upon in the Decision does not support its conclusions regarding the 2005 CIIPA, because of its failure to look to context.¹⁶ None of the cases cited in the Decision involve a document like the CIIPA; instead, all address standard work rules. There is a distinct difference between what a reasonable Region employee would understand “confidential information” to mean in a work rule, compared to its meaning in an agreement specifically protecting intellectual property, proprietary information and inventions.

Contrary to the views of the Decision, the CIIPA is indistinguishable from the lawful rules analyzed in *Lafayette Park Hotel*, 326 NLRB 824 (1998), and *Super K-Mart*, 330 NLRB 263 (1999). The Decision ineffectively tried to distinguish those precedents, because neither contained a provision concerning the disclosure of information about fellow employees. ALJD 10:12-20. This is misguided. In both opinions, the respective rules were deemed lawful because employees reasonably would understand that they were designed to protect legitimate business interests in maintaining the confidentiality of private or business information, rather than to prohibit discussions of terms and conditions of employment. 326 NLRB at *4; 330 NLRB at *1-2. Likewise, that is the aim of the Region’s confidentiality policy, *i.e.*, a legitimate employer interest in protecting business information. That is why the CIIPA stands on the same footing as the rules found lawful in *Lafayette Park Hotel* and *Super K-Mart*.

In sum, the Board’s holding in *Safeway, Inc.*, 338 NLRB 525 (2002), is compelling:

¹⁶ While the Region believes these decisions reciting the importance of context add to the appropriate analysis, to the extent that the Decision relies on *Flex Frac Logistics, LLC*, 358 NLRB No 127 (2012) and *Costco Wholesale Corp.*, 358 NLRB No. 106, at *22 (2012), respectfully, those cases are wrongly decided and will not withstand the scrutiny of the federal appellate courts.

[A] finding that this portion of the confidentiality rule had a chilling effect on employees' exercise of their Section 7 rights depends on a chain of inferences upon inferences: that the employees would infer that the reference to personnel and *payroll records*, in the context of the rest of the rule, referred to their own wages, hours and working conditions, and that employees would further infer that the ban on disclosure to "unauthorized" persons or organizations encompassed their coworkers and the Union.

g. Savings Clause.

The Decision also erred in concluding that a "savings clause" contained in the 2005 CIIPA does not cure the allegedly unlawful effect of any language in that document. The CIIPA states:

"[T]his Agreement does not deny any right provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining."

(AGC Ex. 19, ¶ 2). The Decision found that this language would be effective only if employees are knowledgeable about the NLRA, speculating that employees would be led to forego their Section 7 rights rather than undertake the task of determining the scope of their rights under the savings clause. ALJD 10:30-34.

This is ironic. To find the CIIPA so overbroad as to reasonably chill Section 7 activity, it must be inferred that employees will parse out through entire confidentiality provision, focus only on the select words "employee" and "personnel," read meaning into these two words that does not exist in the rest of the sentence or the agreement, and conclude that those individual words are designed to address the discussion of terms and conditions of employment under the NLRA. Conversely, it must be inferred that those same employees reading the savings clause are not "knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer." ALJD 10:31-33. It requires a high degree of mental gymnastics to conclude on the one hand that an employee would reasonably comprehend the infringement of

NLRA rights under the CIIPA, while simultaneously on the other hand having no understanding of the NLRA protections provided by its savings clause. These are unsustainable contradictions, and the Decision's "heads-I-win-tails-you-lose" rationale cannot stand.

h. The Decision Erred in Its Findings that the Region's Code of Conduct and Employee Handbook are Governed by the Definition of Confidential Information in the 2005 CIIPA (Exceptions Nos. 21-26).

The Decision accepts that the general confidentiality provisions in the Region's Code of Conduct and Employee Handbook do not mention the words "employees" or "personnel," which form the basis for the unfair labor practice finding regarding the CIIPA. ALDJ 10:44-46. Rather than stopping there, the Decision exports the definition of confidentiality from the 2005 CIIPA to the two other documents. The Decision speculates:

It is clear, however, that the 2005 CIIPA, the code of conduct and employee handbook are overlapping in that all three govern the disclosure of "confidential" information and that the 2005 CIIPA defines the nature of what the Respondent considers to be confidential information. The code of conduct and employee handbook do not further explain or limit the term "confidential." Thus, employees who read the three documents would understand that the handbook and code of conduct prohibit the disclosure of information regarding personnel or employees. Therefore, the general confidentiality provision in the code of conduct and the employee handbook, since it does not define confidential differently than the CIIPA, is also facially overbroad.

ALJD 10:46 – 11:38.

To reach the Decision's conclusion that the general confidentiality provisions contained in three discrete documents must be read as one ignores the actual wording, context and purpose of those provisions, as well as sound legal analysis. And there is nothing in the record to support the conjecture that a reasonable employee would read these discrete documents together simultaneously as if they were one and conclude that they are overlapping, especially given the substantially different purposes that each serves.

The Region's Code of Business Ethics and Conduct ("CBE&C")¹⁷ is intended to insure that American Red Cross practices are, and are viewed by the American public as being, "above board." (Tr. 77:10-15). The introductory paragraph of the policy sets the proper context by stating:

In an effort to maintain the high standard of conduct expected and deserved by the American public and to enable the organization to continue to offer its services, the American Red Cross operates under the Code of Business Ethics and Conduct outlined below.

(AGC Ex. 18; AGC, Ex. 8, p. 36). Each of the provisions in the CBE&C serves the fundamental principles of the ARC mission: humanity, impartiality, accountability, independence, voluntary service, unity, and universality. (AGC Ex. 8 at p. 6). In this context, the confidentiality provision of the CBE&C only can be reasonably read as protecting against an employee or volunteer taking advantage for personal gain of his or her access to confidential information due to their affiliation with the organization. (AGC Ex. 8 at p. 6) ("... available solely as a result of the employee's or volunteer's affiliation with the American Red Cross ..."). The provision states:

Confidentiality. Disclose any confidential American Red Cross information that is available solely a result of the employee's or volunteer's affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.

There is nothing on the face of the CBE&C that mentions employee or personnel information, much less terms and conditions of employment at all. No reasonable employee of

¹⁷ The Red Cross Code of Business Ethics and Conduct and the Code of Business Ethics and Conduct contained in the Region's Employee Handbook are identical. (*Compare* AGC Ex. 18 *with* AGC Ex. 8, pp. 36-38). Therefore, the confidentiality provisions of each will be addressed simultaneously. "Code of Business Ethics and Conduct" or "CBE&C" will hereinafter refer to both policies, unless otherwise distinguished.

the Region could possibly read the CBE&C as limiting or chilling the discussion or disclosure of employee information. Rather, the entire impact of the document counsels against such an interpretation. “Where ... the rule does not refer to Section 7 activity, [the NLRB] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 647; *see also Lafayette Park Hotel*, 326 NLRB at 826 (“We choose not to engage in ... speculation that the rule prohibits conduct that it does not address.”); *K-Mart*, 330 NLRB at 263 (“... employees reasonably would understand from the language of Respondent’s confidentiality provision that it is designed to protect the Respondent’s legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions.”).

The Decision’s finding of violation based on an application of simplistic labels rather than a careful consideration of the context for the rules and the perspective of a reasonable Region employee cannot be sustained.

i. Work Rules

The one alleged infraction within the Work Rules segment of the Region’s Employee Handbook is the “[r]elease of confidential donor, patient, client or employee information without authorization.” (AGC Ex. 8, p. 47). As with the CIIPA, only by isolating “employee” information and carving it out from the context of the overall statement could this admonition arguably be read as restricting discussion of terms and conditions of employment. The NLRB has flatly rejected that type of skewed analysis. *See Lafayette Park Hotel*, 326 NLRB at 825-26 (“We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase ... in isolation, and

attributing to the Respondent an intent to interfere with employee rights.”); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *K-Mart*, 330 NLRB at 263.

POINT 5. The Decision Erred in Concluding that the 1993 Confidentiality Policy was in Effect during the Section 10(b) Period and is Unlawfully Overbroad (Exceptions Nos. 27-34).

a. The Record Evidence Unequivocally Demonstrates the 1993 Confidentiality Policy Was Superseded.

The Decision’s conclusion that the Region maintained a 1993 Confidentiality Policy in effect in 2012 during the statutory Section 10(b) period flies in the face of undisputed record evidence. The Region’s CEO, Kathy Smith, testified without contradiction that the policy had been superseded. (Tr. 31:24 – 32:14). Therefore, it cannot serve as the basis for an unfair labor practice finding.

Ignoring the uncontested record, the Decision relies upon the Amanda Laursen termination letter, dated May 24, 2012, which states that her “actions violate[d] the American Red Cross Code of Business Ethics and Conduct, Confidentiality Policy, Confidential Information and Intellectual Property Agreement.” (AGC Ex. 21). Smith clearly testified without opposition that the “Confidentiality Policy” referenced in that letter is the one that appears on page 36 of the current Employee Handbook. (Tr. 88:24 – 89:17)

Q. What is the Confidentiality Policy referred to in those letters?

A. It would be the Confidentiality Policy which is included in the handbook, this page 36

This is because, by the time of Lauren’s termination, the 1993 Confidentiality Policy had been superseded by the confidentiality provision in CBE&C and the identical provision repeated in Employee Handbook. (Tr. 31:24 – 32:14; 87:11 – 88:1; Tr. 33:15-20 (CBE&C went into effect in January 2007); Tr. 47:12-14 (Employee Handbook went into effect April 2010)).

Furthermore, the Decision is wrong to contend that “[t]he record does not contain any other confidentiality policy signed by Laursen, other than the 1993 policy.” ALJD 11:26-28. The record proves that an Agreement and Acknowledgement of Receipt of Employee Handbook was signed by Laursen on May 9, 2010. AGC Ex. 12. Therefore, Laursen was aware of the confidentiality rules that Smith cited as the basis for the letter of discipline.

Accordingly, it was plain error for the Decision to find that the Region “maintained the 1993 confidentiality policy during the 10(b) period.” ALJD 11:26-30.

b. Assuming *Arguendo* that the 1993 Confidentiality Policy was in Effect, the Decision Erred in Concluding that it Violates the NLRA.

Assuming, *arguendo*, that the 1993 Confidentiality Policy properly is in issue in this case, any reasonable reading of its context demonstrates that it is intended to protect confidential *medical* information. The policy states, in relevant part:

All information obtained by virtue of employment with the American Red Cross Blood Services is to be held in the strictest confidence. This includes all information in donor, patient, personnel, and financial records. Blood testing results, Donor Deferral Registry, patient’s illness and clinical conditions are considered confidential medical information and should not be the subject of casual conversation.

(AGC Ex. 3). There is no reference to terms and conditions of employment. “Where ... the rule does not refer to Section 7 activity, [the NLRB] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

Yet the Decision focuses on three excerpts as purportedly proving that the policy is unlawfully overbroad: “information on litigation,” “documents marked ‘Confidential,’” and “Financial Information.” ALJD 12:11-20. From those few examples, the Decision extrapolates that employees would be precluded from discussing the terms and conditions of their

employment with co-workers and outsiders, such as the Union. ALJD 12:11-20. However, where the “language ... does not explicitly prohibit the discussion or disclosure of wages, hours, working conditions, or any other terms and conditions of employment, nor does it forbid conduct that clearly implicates Section 7 rights,” “employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the Respondent’s proprietary business information rather than to prohibit discussion of [protected, concerted activity].” *Mediaone of Greater Florida, Inc.*, *supra*, 340 NLRB at 279. That is the case here.

Read as an integrated document which is indisputably concerned with the protection of confidential donor, patient, and medical information, there is no reasonable basis to believe that “information on litigation” or “financial information” would be understood to restrict Section 7 activity. The Decision’s opinion that “[o]n its face, this prohibition would preclude employees from discussing NLRB and EEOC litigation and arbitrations” is not a reasonable interpretation of the overall wording and purpose of the policy, especially in light of the Region’s status as a healthcare provider. The example is “all information on litigation,” not information on *all* litigation. The reasonable reading is as a reference to litigation involving the donor, patient, or medical information addressed by the policy, which is especially proper for a healthcare organization managing sensitive patient and business information. *Comm. Hosp. of Central Cal.*, 335 F.3d at 1089; *Aroostook*, 81 F.3d at 212-13.

Once again, carefully selected terms read out of context do not render a confidentiality policy unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *Lafayette Park Hotel*, 326 NLRB at 825-26. As such, the Decision erred in concluding that the 1993 Confidentiality Policy is overbroad and violates the NLRA.

POINT 6. The Decision Erred in Concluding that the 2002 Confidential Information and Intellectual Property Agreement was in Effect During the 10(b) Period and is Unlawfully Overbroad. (Exceptions No. 35-38).

The Decision's conclusion that the Region maintained the 2002 CIIPA during the statutory Section 10(b) period also is contrary to the record evidence. It is undisputed on the record that the 2002 CIIPA (AGC Ex. 5) was superseded by the current CIIPA around March, 2005. (Tr. 85:14-23). Therefore, it cannot serve as the basis for an unfair labor practice finding.

For this topic, the Decision looks to the Coutchure termination letter, dated May 24, 2012, which states that her "actions violate[d] the American Red Cross Code of Business Ethics and Conduct, Confidentiality Policy, Confidential Information and Intellectual Property Agreement." (AGC Ex. 20). While there is no evidence that Coutchure ever signed the 2005 CIIPA agreement, the Decision is mistaken that the 2002 CIIPA was never rescinded. ALJD 12:36. It is undisputed on the record that the 2002 iteration of the CIIPA was superseded by the 2005 CIIPA, and the AGC offered no proof to the contrary. And as a practical matter, there is no reason why the Respondent would rely on a superseded policy as the basis for an employee's termination in any event. While it might "*appear* that the Respondent maintained the 2002 CIIPA during the Section 10(b) period by making reference to it in the Coutchure's discharge in May 2012," ALJD 12:38-40 (emphasis added), no such reference appears in the letter, and there is no support in the record for the Decision's presumption. The termination was based on the Code of Business Ethics and Conduct, signed by Coutchure on September 22, 2008 (AGC Ex. 11) and the confidentiality provision in the Employee Handbook, receipt of which was acknowledged by Coutchure in writing on October 21, 2010. (AGC Ex. 13). As such, the Decision erred in concluding that the obsolete 2002 CIIPA was maintained during the Section 10(b) period and that the Region therefore violated the NLRA.

**POINT 7. The Decision Erred in Concluding the Region Violated the
NLRA by Maintaining the Communication Systems Policy.
(Exceptions Nos. 14,42).**

In its “Conclusions of Law,” the Decision finds that the Region’s “Communication Systems” policy is an unfair labor practice. ALJD 27:14-18, 29:9-13. However, the Decision is devoid of any factual or legal analysis applying the record evidence or the applicable legal principles under the Act to the policy. The Decision’s only mention of this allegation in the Amended Complaint, outside of its “Conclusions of Law” and proposed “Order,” is in a footnote brushing aside a Board decision cited by the Respondent. ALJD 8:33 n.5. The Board’s Rules and Regulations require that an administrative law judge’s decision “shall contain findings of fact, conclusions, and the reasons or basis thereof, upon all material issues of fact, law, or discretion presented on the record.” 29 CFR § 102.45(a). The Decision’s holding that the Communication System policy is unlawful failed to meet these mandates, because it contains absolutely no analysis of or support for the naked conclusion that the policy is unlawful. Accordingly, it cannot stand.

Furthermore, any communication sent from an address associated with the Region’s email systems will automatically display the sender’s and the Region’s contact information, the ARC logo and the current ARC campaign slogan for blood collections. (Tr. 95:8-13). It will be clear to any third-party that the content represents and is sent on behalf of the American Red Cross. (Tr. 95:3-16). The Region’s “Communications System” policy reminds all staff of this simple fact: “Employees must be mindful that their association with the Western Lake Erie Region and the Red Cross will be visible to any recipient of an electronic communication.” (AGC Ex. 8, p. 41). Therefore, the policy does no more than ask employees to remember that their electronic communications to any recipient will automatically contain all of the trappings of an official communication from the Region and the Red Cross. Given these

circumstances, it is entirely proper for employees to be directed to “assure that their communications are consistent with the Red Cross mission and accepted community standards,” in order to protect against confusion to the public. (AGC Ex. 8, p. 41).

By its terms, the Communication Systems policy applies to “distributing sensitive, proprietary, confidential, or private information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization”. (AGC Ex. 8, p. 41) (emphasis added). In the context of the Region’s reminder that electronic communications will unavoidably appear to represent and be sent on behalf of the organization, this prohibition reasonably limits unauthorized distribution of the *organization’s* information, not an *employee’s* information. In *Windstream Corp.*, 352 NLRB 510 (2008), the NLRB drew just this distinction between personnel information obtained from the employer’s records and other employee information. The logic of the Board’s holding is sound: the employer’s rule was lawful, because it “clearly identifies the target audience of the rule and makes it clear as well that employees can discuss among themselves personnel information so long as that information did not come into their possession through access to Company records in the course of their job duties.” *Id.* at 1368.

In addition to its general right to protect data it collects, the Region has a legal obligation to do so. By isolating the words “confidential ... information,” the true intent of the policy’s prohibition against disclosure of “sensitive, proprietary, confidential, or private information” is ignored. This context is important, because the record overwhelmingly demonstrates the Region’s paramount interest in protecting sensitive donor and patient medical information. This includes the Region’s many employee-donors, who like any other, provide sensitive personal medical information as part of the process which is maintained by the Employer. Federal laws, like HIPAA, and state privacy statutes require an employer to protect

this medical information and sensitive personal data. *E.g.*, 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information); Ohio Rev. Code Ann. § 1349.19. The Region would be derelict in its legal duties if it did not maintain the prohibitions against disclosure set forth in the Communication Systems policy.

The *Adtranz* court recognized that employers are subject to civil liability for failing to maintain proper workplace policies. *Adtranz*, 253 F.3d at 27. The court reasoned that “[t]o bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a ‘catch 22.’” *Id.* (citation omitted). The same is true here. As a healthcare provider, the Red Cross is entrusted with donor’s sensitive medical information and subject to several laws obligating the Region to protect that confidential information. The Decision’s complete indifference to this reality is improper. For all of the reasons, the Decision’s unsubstantiated and unexplained conclusions regarding the Communications System policy should be reversed.

V. **CONCLUSION**

For all of the reasons stated above, the Decision of Administrative Law Judge Mark Carissimi regarding the Region's confidentiality policies should be reversed and the allegations of the Amended Consolidated Complaint which are the subject of Respondent's exceptions should be dismissed.

Dated: August 2, 2013

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Steven W. Suflas", is written over a horizontal line.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AMERICAN RED CROSS BLOOD
SERVICES, WESTERN LAKE ERIE
REGION,**

Respondent,

Case No. 08-CA-090132

and

CERTIFICATION OF SERVICE

**THE UNITED FOOD AND
COMMERCIAL WORKERS UNION,
LOCAL 75,**


Charging Party.

I, Steven W. Suflas, hereby certify and state that on August 2, 2013, I caused a true and correct copy of the foregoing Brief in Support of Exceptions to the Decision of Administrative Law Judge Mark Carissimi to be served via email to the following:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


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